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No. 00-1073

In The

Supreme Court of the United States

OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, a/k/a OWASSO PUBLIC SCHOOLS; DALE JOHNSON, individually and in his official capacity as Superintendent; LYNN JOHNSON, individually and in her official capacity as Assistant Superintendent; RICK THOMAS, individually and in his official capacity as Principal,

Petitioners,

v.

KRISTJA J. FALVO, as parent and next friend of her minor children, ELIZABETH PLETAN, PHILIP PLETAN, and ERICA PLETAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Family Education Rights and Privacy Act, 20 U.S.C. § 1232g prohibits an educational institution's policy or practice of allowing its students to grade one another's tests and other work and/or to call out their own grades in class.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT OF THE CASE 1

A. NATURE OF THE CASE 1

B. DISPOSITION BELOW 2

REASONS FOR DENYING THE PETITION 4

I. THERE IS NO CONFLICT AMONG THE CIRCUITS 4

II. THE DECISION IS IN HARMONY WITH THE PLAIN LANGUAGE AND PURPOSE OF THE FEDERAL STATUTE 4

III. THE TENTH CIRCUIT CORRECTLY REJECTED THE DEPARTMENT OF EDUCATION'S INFORMAL LETTER OPINION UNDER *CHEVRON, SKIDMORE* AND *CHRISTENSEN* 8

IV. OWASSO HAS MODIFIED AND CORRECTED ITS GRADING PRACTICES WITH LITTLE OR NO INCONVENIENCE TO THE SCHOOL DISTRICT, ITS TEACHERS OR ITS STUDENTS ... 9

CONCLUSION 12

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 8, 9

Christensen v. Harris County, 529 U.S. 576 (2000) 8, 9

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 8, 9

STATUTES

Family Education Rights and Privacy Act, 20 U.S.C. § 1232g 1

Family Education Rights and Privacy Act, 20 U.S.C. § 1232g(a)(4)(B)(i) 5, 6

Family Education Rights and Privacy Act, 20 U.S.C. § 1232g(a)(5)(A) 6, 11

Family Education Rights and Privacy Act, 20 U.S.C. § 1232g(b)(1) 4, 5

Family Education Rights and Privacy Act, 20 U.S.C. § 1232g(b)(4)(A) 7

Family Education Rights and Privacy Act, 20 U.S.C. § 1232(a)(5)(A) 6

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... 1, 2, 3, 4, 11

TABLE OF AUTHORITIES – Continued

Page

OTHER

Kurt, *Grading lawsuit ruling expected to bring warning for teachers,* Shawnee News-Star Online, Tuesday, August 1, 2000 12

U.S. Code Cong. & Admin. News, at 4251 (1974) (Sen.Rep.No. 93-1026, 93rd Congs., 2nd Sess. 187 5

OPINIONS BELOW

The Opinions below are attached to petitioner's Petition at Appendices A-D.

JURISDICTION

Petitioner adequately invokes this Court's jurisdiction under 28 U.S.C. § 1254(1). Subject matter jurisdiction is likewise proper under 42 U.S.C. § 1983.

STATUTORY PROVISION INVOLVED

This case involves the statutory interpretation of the Family Education Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA"). Petitioner sets forth the full text of FERPA at Appendix E-1.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

The Owasso school district allowed its teachers to engage in the practice of having students exchange tests and quizzes for grading. The teacher then asked the students to "call out" their own grades to the teacher. The teachers testified that the purpose for "calling out" the grade was to record the grade in the grade book.

Philip Pletan, the son of respondent, was a 10 year old 5th grade student at Owasso Middle School. Philip was a special education student being "mainstreamed"

into the regular classroom. Philip was subjected to humiliation, ridicule, and loss of privacy caused by the practice of publicizing his private and confidential grades to his peers. The humiliation exacerbated when he entered the 6th grade and continued when he was in the 7th grade, where children at that age, when given the opportunity, were notorious for humiliating him as a result of the publication of his grades. During the 1997-98 and 1998-99 school years, respondent complained about the grading practice to the Owasso school district superintendent, as well as the teachers, that this policy needlessly subjected Philip and her other children Erica and Elizabeth to intimidation and indignity by allowing other students to learn their grades. The school district refused to disallow the grading practice.

B. DISPOSITION BELOW

In October 1998, respondent brought a class action lawsuit pursuant to 42 U.S.C. § 1983 against the Owasso school district, the superintendent, the assistant superintendent, and principal alleging that the grading practice violated the Fourteenth Amendment privacy rights and FERPA. After filing her complaint, respondent sought a temporary restraining order enjoining the district from engaging in the practice at issue. After an evidentiary hearing, the district court denied the relief requested and issued its findings of fact and conclusions of law.

Before the district court resolved whether to certify the class, respondent moved for declaratory and summary judgment on her two claims. Owasso filed a cross-

motion for summary judgment on both claims. The district court concluded the grading practice did not implicate a constitutionally-protected privacy interest. Additionally, the district court ruled that the grades subject to the grading practice did not constitute "education records" under FERPA. Respondent filed her motion to reconsider. The district court denied that motion.

On appeal to the United States Court of Appeals for the Tenth Circuit, respondent asserted that the district court erroneously granted summary judgment in favor of the defendants, because the grading practice violated both the Fourteenth Amendment and FERPA. The court of appeals held that although the Fourteenth Amendment did not preclude the grading practice, FERPA did.

Thus, the court of appeals affirmed the district court's grant of summary judgment on the constitutional claim and reversed the grant of summary judgment on the FERPA claim. The court of appeals also affirmed the grant of summary judgment in favor of the individual defendants on the respondent's claim for damages, but reversed the judgment on the respondent's claim for injunctive relief. Notably, the petitioners never raised issue with, and do not now raise issue with, the court's jurisdiction under § 1983. Nevertheless, the court of appeals addressed the jurisdictional issue and, in accord with all circuit courts, correctly held that a private right of action under § 1983 may be brought by respondent.

Petitioner filed for a rehearing with suggestion for *en banc* review, which was denied. Although a majority of the active judges denied the request, the panel determined on its own motion, to amend the original decision.

Notably, the argument set forth in petitioners' rehearing request was only raised for the first time in their brief for *en banc* review. In its amended opinion the court of appeals addressed those additional concerns the school district had. Circuit Judge Kelly filed his dissenting opinion from the court's denial for rehearing *en banc*.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT AMONG THE CIRCUITS

This case raises a question of first impression. As such, there is no conflict among the circuit courts, or any lower courts interpreting the plain language of the statutorily defined term "education records." Moreover, all circuit courts concur that FERPA provides to a student and parent a private right of action remedied under § 1983. Pet. App. at A-10. For these reasons, this Court should deny the petitioners' writ for certiorari.

II. THE DECISION IS IN HARMONY WITH THE PLAIN LANGUAGE AND PURPOSE OF THE FEDERAL STATUTE

The Tenth Circuit correctly held that the "plain language of the relevant provision of FERPA, 20 U.S.C. § 1232g(b)(1), reveals that it is intended to protect the privacy of students and their parents." The dual purpose of FERPA is to (i) ensure *parents access* of information contained within a students' "education records," and at the same time (ii) protect the information from *unauthorized disclosure*. Congress was concerned to assure that school district practices would *"not invade the privacy*

of students or *pose any threat of psychological damage to them." See* U.S. Code Cong. & Admin. News, at 4251 (1974) (Sen.Rep.No. 93-1026, 93rd Congs., 2nd Sess. 187).

FERPA prohibits educational agencies or institutions from maintaining "a policy or practice of permitting the release of *education records* (or personally identifiable information contained therein . . .) of students without the written consent of their parents" to anyone other than statutorily-defined authorities, *which does not include other students*. 20 U.S.C. § 1232g(b)(1) (emphasis added). Thus, the plain language is consistent with its dual purpose by prohibiting the release of "education records" to anyone other than the student's parent or school authority.

FERPA clearly prohibits the teacher from disclosing the grade information in the teacher's grade book to anyone other than a substitute. § 1232g(a)(4)(B)(i) (the grade book exception). This section provides that information contained in records of instructional personnel, such as grades, shall "not [be] accessible or revealed to any other person except a substitute." The court of appeals explained that "[i]f grade books never constitute 'education records,' teachers would be free under FERPA to reveal them to anyone, thus obviating the need to provide in the statute" the language: "and which are not accessible or revealed to any other person except a substitute." Pet. App. at A-22, 23.

The Tenth Circuit further explained that:

> "[i]f Congress intended FERPA to preclude a teacher from revealing to one student the grades of another student when written in a grade book, it would be incongruous to permit a

> teacher to disclose or allow the dissemination of those grades to other students immediately before recording them in the grade book or noting them in some similar way which serves the same purpose as a grade book record." Pet. App. at A-25.

Congress obviously recognized that since the information contained within a teacher's grade book would necessarily include all students' grades, allowing a parent the right to access her child's "education records" (which includes the "grade book") would necessarily disclose the grade information of another student. This result would be an absurdity and render the statute superfluous. By its own terms, § 1232g(a)(4)(B)(i) (the grade book exception) prevents disclosure of and access to another student's grade information. Accordingly, there is no statutory ambiguity.

Indeed, the only information that may be released by the school district is identified in FERPA as "directory information." 20 U.S.C. § 1232g(a)(5)(A). Thus, "education records" relating to a student which may be released without parental consent include the following:

> "the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student." Pet. App. at E-5.

The statutory list does *not* include students' test scores or grades. Congress could have specifically listed grades or test scores as "directory information," yet, it

did not. Thus, any personally identifiable information not listed as "directory information" shall not be disclosed, disseminated or revealed to anyone other than the student's parent or school official.

In its petition for rehearing, Owasso argued, for the first time, that two provisions within FERPA, which are not at issue, undermine the court's interpretation. Petition at 23-28. The court of appeals, however, properly found that the statutory definition for the term "education records" provided the clear answer to the only question raised. Neither of the two provisions demonstrate Congressional intent to exclude student grades from the definition of "education records." Indeed, the court found that "the notion that a parent should have a right to raise such a challenge [to the accuracy of grades] is neither beyond the pale of possible Congressional intent, nor does it 'trivialize' such intent." Pet. App. at A-26.

Owasso further contends that § 1232g(b)(4)(A) vitiates the court's interpretation. Petition at 23-28. Nothing, however, in the court's interpretation of the defined term "education records" would prohibit a central custodian from maintaining an access record, as the school district seems to fear.

In sum, the plain language of FERPA demonstrates that the term "education records" encompasses the grades at issue in this case. Because the decision is in harmony with the plain language and purpose of the statute, this Court should deny the petition for writ of certiorari.

III. THE TENTH CIRCUIT CORRECTLY REJECTED THE DEPARTMENT OF EDUCATION'S INFORMAL LETTER OPINION UNDER *CHEVRON, SKIDMORE* AND *CHRISTENSEN*

The Tenth Circuit properly rejected the district court's deference to a Department of Education informal letter opinion under *Chevron, Skidmore,* and *Christensen*. The district court erred in granting deference to the Department of Education's Family Compliance Office ("FPCO") opinion letter ("Rooker letter"). The court of appeals rejected the Rooker letter for two reasons. First, the court found the meaning of the term "education records" was clear from the statute itself. A court may only defer to an agency's interpretation if a statute is deemed ambiguous under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). Pet. App. at A-18. Second, the court of appeals explained that,

> "even if the relevant statutory language was ambiguous, the Supreme Court recently announced that *Chevron* deference does not extend to an interpretation contained in an opinion letter issued by the administering agency" under *Christensen v. Harris County*, 529 U.S. 576 (2000). Pet. App. at A-19.

Additionally, the court of appeals held that the Rooker letter would carry minimal persuasive power under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) since the letter contained a disclaimer that the FPCO had not thoroughly considered the issue before the court. Pet. App. at A-19, 20. The letter contained the following:

> "Because you do not fully explain the details surrounding the activities you identify, *it would not be appropriate* for this Office to comment *on whether the District's participation in the activities would violate rights afforded parents by FERPA.*" Pet. App. at F-3.

Rooker explains that an educational agency is prohibited by FERPA from publishing or posting the grades of students *if personally identifiable*. Yet, without reason or logic, he opines that FERPA would not prohibit the practice of "calling out" that grade. As the court of appeals found, the Rooker letter is "bereft of any reasoning underlying the rather conclusory opinion that grades written down by other students and announced to the teacher are not maintained" by the school district. Pet. App. at A-20.

The Rooker letter ignores the broad language of the term "education records," the narrow term defining "directory information," and the dual purpose of FERPA. Accordingly, the Tenth Circuit correctly rejected the FPCO's informal letter opinion under *Chevron, Skidmore,* and *Christensen*.

IV. OWASSO HAS MODIFIED AND CORRECTED ITS GRADING PRACTICES WITH LITTLE OR NO INCONVENIENCE TO THE SCHOOL DISTRICT, ITS TEACHERS OR ITS STUDENTS

Owasso's assistant superintendent has recently testified by sworn affidavit that the school district is in full compliance with the Tenth Circuit order and has modified its grading practice such that the teachers do not disclose grades to anyone without authorized consent.

Res. App. at 6-7. Moreover, there exists no evidence in the record that would suggest that Owasso, or any other school district, could not properly educate students without disclosing grades.

Indeed, the district court admonished Owasso casting serious doubt as to whether "the grading method under review could not undergo modification while still properly educating students." Pet. App. at B-5. The district court stated that it would be hard-pressed to find that this grading practice is supported by any compelling interest. *Id.* Judge Kern explained that "the record reflects that many teachers, even in this immediate geographical area, do not employ the student grading method." *Id.*

The court of appeals decision, taken together with the undisputed evidence in the record, demonstrates that Owasso and its teachers could easily modify, and have indeed modified, their grading practices with little or no burden to the school district, the teachers or the students. Since the record in this case establishes that other teachers and school districts are able to meet the same curriculum objectives without disclosing students' grades, petitioners' fear that the decision will disrupt a significant educational practice is neither supported by the facts nor the law of this case.

As the lower court explained, there exist reasonable alternatives to accomplish the curriculum objectives which would not pose any onerous burden on the school district or the teachers. The court explained that FERPA forbids neither the practice nor the benefits of allowing immediate feedback or relieving the teacher of the time-consuming task of correcting tests. Pet. App. at A-28

fn.13. "There necessarily exist further alternatives to the practice of having students correct other students' papers without parental consent or anonymity." *Id.* "The statute does not prohibit students from correcting papers if done anonymously or with the consent of parents." *Id.* The record reveals several means to accomplish the educational objectives desired without releasing the students' grades. Even the school district concedes that the "students' privacy may be maintained by use of confidential identification numbers on their papers rather than the students' names." Res. App. at 7. Indeed, the fact that *other* teachers and school districts do not engage in this practice undermines petitioners' speculation.

Petitioners' concern of not being able to disclose honors and awards is resolved by the statutory grant of authority to release such student awards as provided in the "directory information." Pet. App. at E-5. Section 1232g(a)(5)(A) specifically allows the release of student award information. *Id.*

The teachers' speculation of personal liability under § 1983 is likewise unfounded, since FERPA liability would arise only from a school district official policy or practice of disclosing grades. Thus, any inadvertent release of grade information would not subject a teacher or the school district to liability if the conduct was not an official policy or practice. Quoted by the Associated Press in the August issue of the Shawnee News-Star Online, the Oklahoma Education Association president, Carolyn Crowder, explained that this ruling would not "really change the way teachers teach." And, the teachers will

"continue to use good sense in protecting students' privacy." Kurt, *Grading lawsuit ruling expected to bring warning for teachers*, Shawnee News-Star Online, Tuesday, August 1, 2000.

CONCLUSION

The Tenth Circuit's decision comports with the purposes and structure Congress intended to achieve in protecting students' educational records. Petitioners' speculative fears are unfounded by evidence of its immediate modification of the practice and available alternatives to trading tests, grading each others work and calling out those grades. Respondent maintains the decision is without error and, therefore the petition for certiorari should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

KRISTJA J. FALVO, as parent and next friend of her minor children, ELIZABETH PLETAN, PHILIP PLETAN, and ERICA PLETAN; and on behalf of all others similarly situated,	)	**Case No. 98CV 0765K (J)**
Plaintiffs,	)	
vs.	)	
OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, a/ka/ OWASSO PUBLIC SCHOOLS; DALE JOHNSON, individually and in his official capacity as Superintendent; LYNN JOHNSON, individually and in her official capacity as Assistant Superintendent; RICK THOMAS, individually and in his official capacity as Principal; and Does 1 through 50,	)	
Defendants.	)	

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR ENTRY OF PERMANENT INJUNCTION PURSUANT TO TENTH CIRCUIT MANDATE

(Filed Nov. 9, 2000)

The defendants, Independent School District No. 11 of Tulsa County, Oklahoma (the "Owasso School District"), Dale Johnson, Superintendent of the Owasso

School District, Lynn Johnson, Assistant Superintendent of the Owasso School District, and Rick Thomas, Principal of the Sixth Grade Center at the Owasso School District, respectfully submit this brief in opposition to the *Plaintiff's Motion for Entry of Permanent Injunction Pursuant to Tenth Circuit Mandate*, filed in this matter of October 23.[1] Unless referred to individually, the defendants will be referred to collectively as the "School District Defendants."

On October 4, 2000, the United States Court of Appeals for the Tenth Circuit denied the School District Defendants' request for a rehearing en banc of that court's July 31 decision in the captioned action. Pursuant to Rule 13(3) of the Rules of the United States Supreme Court, the School District Defendants have ninety (90) days from October 4, 2000, or until January 2, 2001, to file a petition for certiorari in the United States Supreme Court. The Board of Education of the Owasso School District will meet on Monday, November 13, 2000, to determine whether to authorize its attorneys to file a petition for certiorari with the United States Supreme Court. The undersigned counsel for the School District Defendants anticipates the Board of Education will direct the preparation and filing of a petition for certiorari.

The School District Defendants respectfully submit that Plaintiff's motion is premature. Entry of a permanent injunction at this time, given the likelihood that the School District Defendants will seek certiorari on this

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[1] This response is therefore timely filed pursuant to Rule 6(e), FED.R.CIV.P.

question of nationwide significance, would needlessly burden the parties and the courts with the filing of an additional appeal of the permanent injunction before the final resolution of the appeal of this Court's summary judgment decision. This would involve the needless use of judicial resources and would unnecessarily increase the cost of this litigation to both sides. Should the Supreme Court decline to grant certiorari, this matter can, *at that time*, be finally concluded in an efficient manner for both the parties and this Court.

The Plaintiff will not be prejudiced by declining to enter a permanent injunction at this time. Although the Plaintiff asserts in her motion that "[o]n information and belief individuals at the Owasso schools continue to violate the mandate of the Tenth Circuit ruling," the Plaintiff has offered absolutely *no evidence* in support of this allegation. Attached to this brief is the *Affidavit of Lynn Johnson*, the Assistant Superintendent of the Owasso School District, who states that *all teachers and administrators* at the Owasso School District were advised of the Tenth Circuit's decision prior to the start of classes for the current (2000-2001) school year and were advised that the Tenth Circuit has held that the grading practice challenged in this action violates federal law. Johnson's affidavit establishes that the Owasso School District has advised all of its teachers and administrators that the Owasso School District no longer allows students to exchange homework papers and in-class assignments and grade each others' work.

The School District Defendants are therefore in full compliance with the Tenth Circuit's ruling, and there is no need for the entry of a permanent injunction pending

the School District Defendants' filing of a petition for certiorari with the United States Supreme Court.

For the reason set forth in this brief, the School District Defendants respectfully request that the Plaintiff's *Motion for Entry of Permanent Injunction* be denied or, in the alternative, that it be held in abeyance pending the filing and disposition of a petition for certiorari with the United States Supreme Court.

ROSENSTEIN, FIST & RINGOLD

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Attorneys for the School District Defendants

CERTIFICATE OF MAILING

I hereby certify that on this 9th day of November, 2000, I mailed a true, correct and exact copy of the foregoing document by United States mail, certified, return receipt requested to:

Will K. Wright
P.O. Box 423
Claremore, OK 74018

By: /s/ Karen L. Long
Karen L. Long

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

KRISTJA J. FALVO, as parent and next friend of her minor children, ELIZABETH PLETAN, PHILIP PLETAN, and ERICA PLETAN; and on behalf of all others similarly situated, **Plaintiffs,** **vs.** **OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, a/ka/ OWASSO PUBLIC SCHOOLS; DALE JOHNSON, individually and in his official capacity as Superintendent; LYNN JOHNSON, individually and in her official capacity as Assistant Superintendent; RICK THOMAS, individually and in his official capacity as Principal; and Does 1 through 50,** **Defendants.**	**Case No. 98CV 0765K (J)**

AFFIDAVIT OF LYNN JOHNSON

I, Lynn Johnson, being of lawful age, after being duly sworn upon oath, state as follows:

1. This Affidavit is made on personal knowledge of facts to which I am competent to testify.

2. I am the Assistant Superintendent of the Owasso School District. I have held that position since before the inception of the present litigation.

3. On July 31, 2000, the United States Court of Appeals for the Tenth Circuit issued its decision in the instant case. The Tenth Circuit affirmed this Court's grant of summary judgment to the defendants on the plaintiff's "right of privacy claim" under the United States Constitution and reversed the summary judgment with regard to the plaintiff's claim under the Family Education Rights Privacy Act, 20 U.S.C. § 1232g ("FERPA"). The Tenth Circuit ruled that the practice followed by some teachers at the Owasso School District of having students exchange homework papers and in-class assignments and grade each others' work while the teacher went over the answers aloud in class violated FERPA, without regard to whether the student was required to announce his or her score aloud or had the option of reporting the score to the teacher in confidence. The Owasso School District timely filed a Petition for Rehearing En Banc, which was denied, with four (4) judges of the Tenth Circuit dissenting, on October 4, 2000.

4. Based on the July 31 decision of the Tenth Circuit, the Owasso School District advised *all certified employees* (administrators and teachers) that the practice of exchanging papers and having students grade each others' work had been held to be a violation of federal law and was no longer permissible. All administrators and teachers were informed prior to the start of classes for the 2000-2001 school year in August of 2000 that such grading practice would no longer be allowed at the Owasso School District.

5. This action was taken to insure that the Owasso School District and all named defendants were in compliance with the Tenth Circuit's order notwithstanding the Owasso School District's decision to seek a rehearing en banc of the original decision.

6. Prior to the start of classes for the 2000-2001 school year, the Owasso School District was advised by its legal counsel that the *only circumstances* under which one student could lawfully see the grade or score on another student's paper would be if the students' privacy was maintained by the use of confidential identification numbers on their papers rather than the students' names, or if the students' parents voluntarily signed a release under FERPA authorizing the publication of the students' scores.

7. I am not aware of any teacher at the Owasso School District utilizing either of these procedures.

Further Affiant sayeth not.

/s/ Lynn Johnson
Lynn Johnson

Subscribed and sworn to before me this 9th day of November, 2000.

Notary Public /s/ Peggy L. Morgan

My Commission Expires: Aug. 17, 2003